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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

OFFICE OF SECRETARY
DOCKETING & SERVICE
BRANCH

_____)	
In the Matter of)	
)	
LONG ISLAND LIGHTING COMPANY)	Docket No. 50-322-OL-3
)	(Emergency Planning)
(Shoreham Nuclear Power Station,)	
Unit 1))	
_____)	

GOVERNMENTS' MOTION FOR EXTENSION
OF DISCOVERY IN THE REMANDED PROCEEDING
REGARDING ROLE CONFLICT OF SCHOOL BUS DRIVERS

I. Introduction

The 30-day discovery period on the remanded Contention 25.C school issues is scheduled to end next week. Despite their best efforts, the Governments are unable to complete all discovery which needs to be pursued or designate all witnesses by that time. The Governments thus move for a 30-day extension of the discovery period. Given the little time left for discovery under the Board's present 30-day schedule, expedited consideration of this Motion is necessary. The Board is therefore requested to convene a transcribed conference call of counsel no later than this Friday, January 29, to rule on this Motion.

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Compelling reasons support this Motion. First, LILCO has refused to comply with the Governments' discovery requests. As a result, Suffolk County on January 25 filed a motion to compel discovery. Discovery cannot be completed until the Board rules on that motion.

Second, the NRC Staff and FEMA have failed to respond to the Governments' discovery requests, even though responses to the County's requests were due to be filed over a week ago. The Governments are informed that such responses (and presumably witness designations) will be filed any day. But, until responses are received, the Governments are not in a position to complete discovery.

Third, the Governments just this week received Revision 9 of LILCO's plan, despite that fact that LILCO has been promising Revision 9 for months. Before discovery can be completed, Revision 9 must be carefully reviewed with respect to school issues, so that it can be determined what additional discovery is needed.

Fourth, at this time the precise issues being litigated in the remanded Contention 25.C proceeding have not been defined. LILCO's January 25 Motion in Limine, which was just received yesterday, will require a detailed response and Board ruling before the pending dispute among the parties regarding issues at stake in this proceeding can be resolved. In the interim, discovery cannot be completed.

Fifth, the Board must recognize and take into account that there has been a tremendous "crunch" of work on other issues since discovery on the remanded Contention 25.C issues started. This has included substantial work necessary to the filing of a proposed EBS contention on January 12, the Governments' hospital evacuation response on January 15, the so-called "may" brief on January 15, the Section 50.47(c)(1)(i)-(ii) response on January 19, and the 25% power brief on January 22. Substantial other work, including preparing responses to the LILCO immateriality summary disposition motion (due February 1), the NRC Staff's support of LILCO's hospital evacuation summary disposition motion and on the Section 50.47(c)(1)(i)-(ii) response (due February 1), and LILCO's six other summary disposition motions on legal authority/realism issues (due February 10), also has been performed. This other work has severely restricted the time available to the Governments to devote to the Contention 25.C remanded issues, although the Governments have been diligent there as well. Indeed, during the last several weeks, the Governments have filed sets of interrogatories and document requests, requests for admissions, deposition notices, a motion to compel, and responses to LILCO's discovery requests. In addition, depositions of identified witnesses are scheduled to begin tomorrow.

In short, the 30-day discovery period for discovery on the remanded Contention 25.C issues was too short. Additional time is needed to prepare the Governments' case. The Governments seek

no "delay" for delay's sake, but a fair revision of the discovery schedule so that they can satisfy their other obligations and still prepare adequately for the remand proceeding. LILCO's suggestion, in its Motion in Limine, that the Board can set a testimony and hearing schedule leading to a trial in early March is plainly unreasonable in light of the significant workload facing the Governments and the many open issues before this Board. Accordingly, the Board should extend discovery for 30 days, or until March 4, 1988. It is also suggested that the Board schedule a conference of counsel at the close of discovery -- for instance, the week of March 7 -- at which time a final schedule for the filing of testimony, motions to strike and other pretrial matters can be discussed and decided upon.

To summarize, the Board must do two things: (1) revise the existing discovery schedule, since fairness and orderly procedure demand no less; and (2) take charge of this proceeding. The Governments have urged repeatedly that neither the Board's nor the parties' interests are served by running a proceeding in response to LILCO's unabashed efforts to force schedules on the Board that are unrealistic and one-sided in LILCO's favor. This Board should summarily reject LILCO's attempts to dictate the pace of the remanded Contention 25.C proceeding.

These matters are discussed more fully below. The Governments reiterate their request that this Motion be decided this

week via conference call.^{1/} If the Board wishes counsel to appear in person before the Board, that also can be accomplished.

II. This Board's December 30 Memorandum and Order

In its December 30, 1987 Memorandum and Order (Ruling on Applicant's Motion of October 22, 1987 for Summary Disposition of Contention 25.C Role Conflict of School Bus Drivers) (hereafter, "December 30 Order"), the Board acknowledged the existence of outstanding "emergency planning issues concerning the evacuation of school children," and indicated a preference to resolve those outstanding issues in the remanded proceeding on Contention 25.C. December 30 Order at 6. To achieve that end, the Board set forth the scope of discovery for this proceeding. In light of LILCO's new schools evacuation proposal, as first summarily described by LILCO in its October 22, 1987 motion for summary disposition,^{2/} the Board stated:

It will suffice for our purposes that an opportunity to confront this plan [i.e., LILCO's new proposal] be provided and a period for discovery on

^{1/} In LILCO's January 25 "Motion in Limine and Motion to Set a Hearing Schedule," LILCO stated (at page 14) that it was available for a conference call. The Governments stress that they are willing in such a call to discuss the scheduling issues raised by LILCO at pages 13-14 of that motion. The Governments are not willing, however, to discuss LILCO's so-called "Scope of the Role Conflict Issue" (pages 1-13) in an expedited conference call. That issue, and the arguments made by LILCO in its motion, require detailed briefing.

^{2/} LILCO's Motion for Summary Disposition of Contention 25.C ("Role Conflict" of School Bus Drivers), dated October 22, 1987 (hereafter, "LILCO's Motion").

the plan's dimensions be authorized. Accordingly, the Board permits a discovery period of 30 days on LILCO's new auxiliary proposal . . .

December 30 Order at 5 (emphasis added).

There is now approximately one week left before the 30-day period for discovery permitted by the Board comes to an end. As will be demonstrated below, one week is not enough time to complete discovery in this case. Accordingly, the Board should extend the discovery period for an additional 30 days, or until March 4, 1988.

III. Discussion

There are compelling reasons why the Board's 30-day discovery period must be extended. In the best of circumstances, 30 days is an extremely brief time for discovery (even on a remanded issue) since NRC rules give 14 and 30 days for responses to interrogatories and document requests. 10 CFR § 2.740b and 2.741. In the circumstances of this case, despite the Governments' diligent efforts, which included the filing of initial discovery requests on LILCO, the NRC Staff and FEMA on January 4, the very day the Governments received the December 30 Order, the 30 days has proved insufficient.

A. More Time Is Needed Because LILCO Has Resisted and the NRC Staff and FEMA Have Failed to Respond to the Governments' Discovery Requests

Notwithstanding the Board's clear ruling permitting discovery into the "dimensions" of LILCO's new schools evacuation proposal, LILCO has generally refused to provide any discovery beyond the very narrow issue of whether there will be enough school bus drivers available in a Shoreham emergency. Specifically, with respect to interrogatories and document requests filed by Suffolk County on January 4,^{3/} LILCO had refused, until yesterday, to provide any documents to the County. Further, although LILCO responded to some of the interrogatories set forth in the County's First Discovery Request on January 20,^{4/} LILCO's Response was so replete with unsupportable objections and refusals to produce relevant information that the County was forced to petition this Board for an order compelling LILCO to respond to the County's First Discovery Request.^{5/} The County's Motion to Compel has, of course, not yet been ruled upon by the Board, and at this time discovery of the basic information requested by the County's First Discovery Request is at a standstill.

^{3/} Suffolk County's First Set of Interrogatories and Request for Production of Documents, dated January 4, 1988 (hereafter, "County's First Discovery Request").

^{4/} LILCO's Responses and Objections to Suffolk County's First Set of Interrogatories and Request for Production of Documents, dated January 20, 1988 (hereafter, "LILCO's Response").

^{5/} Suffolk County's Motion for Order Compelling LILCO to Respond to Suffolk County's First Set of Interrogatories and Request for Production of Documents, dated January 25, 1988 (hereafter, "Motion to Compel").

Moreover, at this time, neither the NRC Staff nor FEMA has even filed a response to any of the discovery requests that were filed and served on them by the County on January 4.^{6/} Thus, although the County has noticed the depositions of the witnesses LILCO has thus far identified, no Staff or FEMA witnesses have been noticed, since they have not yet even been made known to the County. In addition, it may be necessary to postpone the noticed LILCO depositions,^{7/} since meaningful and productive depositions cannot be taken until LILCO has produced all documents requested in discovery and there has been sufficient time to review and analyze their contents. At this time, there has not been time to review thoroughly the documents received by the County on January 26; however, even a cursory review of the documents reveals that LILCO continues to withhold relevant documents from the County, based upon unsupportable objections by LILCO's counsel regarding the scope of the Contention 25.C remand proceeding.^{8/}

^{6/} Suffolk County's First Set of Interrogatories and Request for Production of Documents to the NRC Staff and FEMA, dated January 4, 1988.

^{7/} Depositions of LILCO's witnesses have been noticed for February 2, 3, 4 and 5. The depositions, as noticed, would be taken on Long Island and in Washington, D.C.

^{8/} Neither LILCO nor the NRC Staff or FEMA has yet responded to the discovery requests of New York State, which were served on January 22. See State of New York's First Set of Interrogatories and Request for Production of Documents to Long Island Lighting Company, dated January 22, 1988, and State of New York's First Set of Interrogatories and Request for Production of Documents to the NRC Staff and FEMA, dated January 22, 1988.

B. The Governments Need Additional Time to Prepare Their Affirmative Case

In addition to LILCO's insistence on stonewalling the County's (and perhaps New York State's) legitimate discovery requests, other reasons compel extending discovery beyond the present 30-day period. Additional time, for example, is needed for the Governments to develop their affirmative case, including the identification of witnesses expected to be called on their behalf. Such additional time is required not just to meet with prospective witnesses, so that their willingness and ability to testify and their time availability can be determined, but also because the need for witnesses cannot even be fully ascertained until after the Governments have received substantive responses to their outstanding discovery requests. Further, the Governments learned just yesterday of a new LILCO witness and a study which he had conducted regarding role conflict among bus drivers during major emergency evacuations. Time will be needed to depose that witness and, thereafter, to decide whether the Governments need to designate a witness to respond.

C. Discovery Cannot Be Completed Until the Scope of this Proceeding Is Clarified

As made clear in the County's January 25 Motion to Compel, there is a sharp difference of opinion between the Governments and LILCO about the scope of the remanded Contention 25.C remand proceeding. LILCO's January 25 Motion in Limine underscores that

difference of opinion.^{9/} In the Governments' view, a significant number of issues, beyond the issue of how many school bus drivers could potentially be available, are raised by LILCO's new proposal. That is, as Contention 25.C itself makes clear, the availability of drivers cannot be analyzed, reviewed, or evaluated in a vacuum. Rather, whether a sufficient number of drivers are available to permit implementation of protective actions for school children can only be addressed intelligently and meaningfully in the context of what duties they are expected to perform, and how, by what means, and when they are to perform them.^{10/}

Thus, several issues related to the "dimensions" and practicalities involved in LILCO's new schools evacuation proposal must

^{9/} See LILCO's Motion in Limine and Motion to Set Hearing Schedule, dated January 25, 1988 (hereafter, "LILCO's Motion in Limine").

^{10/} Thus, the "dimensions" of LILCO's new proposal include, but are not limited to, the following kinds of issues: the amount of time necessary to accomplish an evacuation of school children under LILCO's new proposal; whether school districts or superintendents would, or could, permit LILCO employees to transport school children; whether, and how, a "single wave" evacuation could be implemented by LILCO workers, particularly in the absence of any identified reception centers to which the evacuated children would be taken; how LILCO employees responsible for transporting school children would be notified and mobilized at preassigned bus yards; the impact on the implementability of other portions of LILCO's Plan of having 562 additional emergency workers to mobilize, dispatch, communicate with, supervise, coordinate, and otherwise control; the adequacy of facilities to accommodate these new workers; the adequacy of equipment and other LERO staff to service and manage 562 additional workers; whether there would be an adequate number of buses available for use by LILCO's employees; the adequacy, legality, and efficacy of LILCO's proposed training of school bus drivers; the value, if any, of LILCO's "commitment" to offer training, equipment and compensation to school bus drivers; and the impact of survey data and other evidence concerning role conflict on the adequacy and implementability of LILCO's new proposal.

be resolved in LILCO's favor, before it can be determined (a) whether the allegation of Contention 25.C -- that under the LILCO Plan, "LILCO will be incapable of implementing the . . . protective actions [of] early dismissal of schools . . . [and] evacuation of schools" -- is correct, or (b) that LILCO's proposal is workable and will adequately protect the health, safety and welfare of the school children within the Shoreham 10-mile EPZ, as required by 10 CFR §§ 50.47(a)(1) and (b). LILCO disagrees, however, claiming that the only issue before the Board is the abstract and meaningless one of the number of school bus drivers which in theory could be available for duty in a Shoreham emergency. See, e.g., LILCO's Response at 2; LILCO's Motion in Limine at 3. Until this Board resolves what issues are subject to litigation in the remand proceeding, discovery cannot be completed. Thus, rulings on the County's pending Motion to Compel and LILCO's Motion in Limine are necessary prerequisites to the completion of discovery in this case. Before ruling, however, the Board must afford the parties the opportunity provided them under the NRC's rules to respond. 10 CFR § 2.730(c).

D. The Impact of Revision 9

Extension of the 30-day discovery period is also required by LILCO's recent submission of Revision 9 of its Plan. That Plan revision, received by the Governments on January 25, essentially amounts to a new LILCO Plan, consisting of perhaps thousands of pages. Just with respect to schools issues, Revision 9 contains new information regarding evacuation time estimates, buses, bus

drivers, and reception centers for school children. The Governments will need to review and analyze Revision 9 to determine its impact on the remanded Contention 25.C proceeding. Such review and analysis will be a time-consuming task, given the sheer size of Revision 9. LILCO has only itself to blame for this situation. It is LILCO's Plan, and despite LILCO's representations for many months that Revision 9 would be forthcoming "in the near future," LILCO has just now submitted the revisions promised for so long.^{11/}

E. LILCO Has Acknowledged that Discovery Cannot Be Completed Within the 30-Day Period

LILCO itself has conceded that discovery cannot be completed within the 30-day period announced by this Board in its December 30 Order. In its Motion in Limine served on the parties yesterday, LILCO indicated that it expected to designate additional witnesses in the Contention 25.C remand proceeding, but argued that there was no reason why discovery could not be "essentially completed" within the Board's 30-day discovery period. LILCO did, in fact, designate an additional witness on January 26, informing counsel for Suffolk County that he would be available for deposition on February 5 -- two days beyond the February 3 discovery completion date calculated by LILCO in its Motion in Limine (at page 13). Thus, LILCO by its own actions

^{11/} Faced with a similar situation in December 1983, when LILCO issued Revision 3 of its Plan, the Board suspended hearings to permit the parties time to file revised contentions and to amend already-prepared testimony.

has extended discovery beyond the period contemplated by the Board.

The deposition of this new LILCO witness, as well as LILCO's other witnesses, and the production of documents and discovery responses by the NRC Staff and FEMA may also compel the Governments to designate additional witnesses. Indeed, this very same situation occurred during the Exercise litigation before the OL-5 Licensing Board and, as a result, the Board extended discovery and otherwise modified the hearing schedule which had been established. See Transcript of Conference of Counsel, January 6, 1987.

F. The Press of Other Work Has Made It Impossible to Complete Discovery

The reasons described above are in themselves sufficient to grant the requested 30-day extension of discovery. There is, however, an additional compelling reason why additional time must be granted. Simply put, the press of other work in the Shoreham proceeding has made it impossible to devote all of the resources necessary to complete discovery in the remanded Contention 25.C proceeding within the 30-day period.

It is not necessary to set forth in detail all the work that has had to be performed during the last several weeks with respect to the various matters which are pending in the OL-3, OL-6, and OL-5 proceedings. In the introduction to this Motion, the

Governments have summarized some of the matters which have taken significant attorney time and resources during January 1988.^{12/}

The Governments submit that it would be improper for this Board to close its eyes to the reality that the parties in the Shoreham proceeding are working very hard and that resources are stretched thin as a result. Despite these efforts, there simply has not been sufficient time to devote all necessary resources to the remanded Contention 25.C issues pending before the Board. In these circumstances, the Board should acknowledge what is obvious: the 30-day discovery period provided for in the Board's December 30 Order was simply too short; the Board is in no position to order a trial schedule at this time; and fundamental fairness requires an additional 30-day period, at a minimum, to allow the orderly completion of discovery in this case.

The Governments are constrained to add a further comment. LILCO's Motion in Limine seeks the immediate imposition of a trial schedule, and dates for submission of prefiled testimony by

^{12/} Other matters which presently remain outstanding include: response to the Staff's support of LILCO on summary disposition of hospital issues and potential future proceedings on that issue; further proceedings concerning response to the Governments' EBS contention and LILCO's new EBS proposal; response to the Staff's support of LILCO on its 10 CFR § 50.47(c)(1)(i)-(ii) summary disposition motion; response to LILCO's six other legal authority summary disposition motions (and further filings if the Staff supports LILCO); response to LILCO's Motion in Limine; response to LILCO's appeal of the Frye Board's December 7, 1987 PID; response to the forthcoming reception center decision; response to a forthcoming second Frye Board exercise decision; review of Rev. 9 of LILCO's Plan, which was received by the Governments on January 25; and response to LILCO's exercise request.

the parties. LILCO's motion represents a further LILCO effort, in a long line of efforts beginning in September 1987, to impose by motion LILCO's views of what the scope and schedule of these proceedings should be upon the Board and other parties. The Governments have repeatedly urged the Margulies Board, and now this Board, that it is essential that the Board take control of the proceedings before it, convene a conference of counsel, and hear arguments and discussion of what is fair for all the parties. The Board has rebuffed the Governments' efforts so far, allowing the proceedings to go forward on the basis of LILCO's conception of what makes sense, including the filing of endless summary disposition motions which are, of themselves, a significant reason why an additional period of discovery in the remanded Contention 25.C proceeding is now required.

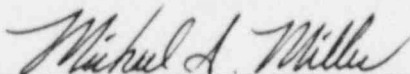
Once again, the Governments are compelled to request the Board to take control of the proceedings before it. The Board should promptly order a 30-day discovery extension. It should also announce its intention to hold a conference of counsel at the conclusion of the discovery period, perhaps during the week of March 7, so that the views of all the parties can be heard in one coherent setting, rather than in the context of time-consuming pleadings, responses, and Board rulings.

IV. Conclusion

For all the foregoing reasons, the Board should extend the 30-day discovery period for an additional 30 days, or until March 4, 1988. Given the pendency of witness depositions and the little time left for discovery to be completed under the Board's present 30-day schedule, the Government requests that the Board give this Motion expedited consideration this week, via a conference telephone call of counsel.

Respectfully submitted,

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NUCLEAR REGULATORY COMMISSION

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CERTIFICATE OF SERVICE

I hereby certify that copies of GOVERNMENTS' MOTION FOR EXTENSION OF DISCOVERY IN THE REMAND PROCEEDING REGARDING ROLE CONFLICT OF SCHOOL BUS DRIVERS have been served on the following this 27th day of January, 1988 by U.S. mail, first class, except as noted:

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